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No. 06-134

In the Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, ET AL., PETITIONERS

v.

CITY OF NEW YORK, NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a suit to recover unpaid property taxes imposed on property owned by a foreign sovereign and to declare the validity of a tax lien arising out of those unpaid taxes falls within the exception to the general rule of immunity in the Foreign Sovereign Immunities Act of 1976 (FSIA), for cases in which rights in immovable property are in issue, 28 U.S.C. 1605(a)(4).

2. Whether the court of appeals erred by relying, in the course of interpreting the FSIA's immovable property exception, on materially different provisions in two international conventions regarding state immunity to which the United States is not a party.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Foreign Sovereign Immunities Act of 1976, confers jurisdiction on a United States court to adjudicate the question whether a foreign state's real property, used in connection with its mission to the United Nations, is subject to taxation. The United States has a significant interest in the resolution of that question. Allowance of such suits would adversely affect the Nation's foreign relations by subjecting foreign states to suit in the United States on claims as to which both historical and present international practice afford immunity. Such suits in the United States could also encourage foreign states to assert jurisdiction in such cases or to take retaliatory actions against property of the United States abroad. In response to

the Court's invitation, the Solicitor General filed a brief at the petition stage expressing the views of the United States.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602 *et seq.*), "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA establishes a general rule that a foreign sovereign is immune from suit in the United States. 28 U.S.C. 1604. The FSIA also sets out defined exceptions to that rule of immunity. 28 U.S.C. 1605 (2000 & Supp. IV 2004). A court may exercise jurisdiction over a foreign state only if the suit comes within one of those specified exceptions to immunity. See 28 U.S.C. 1330(a); *Verlinden*, 461 U.S. at 493.

Before 1952, the United States followed a policy of extending "virtually absolute immunity to foreign sovereigns," *Verlinden*, 461 U.S. at 486, under which "foreign sovereigns and their public property [we]re * * * not * * * amenable to suit in our courts without their consent," *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134 (1938). In 1952, the Department of State announced the adoption of the "restrictive" theory of foreign sovereign immunity. See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) (Tate Letter), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976). The Tate Letter stated that thenceforth the Department would recommend that foreign states be granted immunity only for their sovereign or public acts (*jure imperii*), and not for their commercial acts (*jure gestionis*). *Ibid.* See *Verlinden*, 461 U.S. at 487. "For the most part, the [FSIA] codifies, as a matter of

federal law, the restrictive theory of sovereign immunity." *Id.* at 488.

The immunity exception at issue in this case predates the Tate Letter. Even under the "absolute" theory of sovereign immunity, it was recognized that immunity did not bar certain claims "with respect to real property." Tate Letter (*Alfred Dunhill*, 425 U.S. at 711) ("There is agreement by proponents of both [the absolute and restrictive] theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property."). A foreign sovereign that acquired immovable property in the territory of another sovereign was "deemed to do so subject to the condition that the territorial sovereign may subject to adjudication before its tribunals questions pertaining to title or the adverse interests of individual claimants." 2 Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 848 (2d ed. 1945).

The immunity exception for immovable property was carried forward and recodified by Congress in 1976 in the FSIA. 28 U.S.C. 1605(a)(4). Under that provision, a foreign state shall not be immune in any case "in which * * * rights in immovable property situated in the United States are in issue." *Ibid.*

2. Respondent City of New York brought suit against petitioners, the Permanent Mission of India to the United Nations and the Permanent Representative of Mongolia to the United Nations, based on their failure to pay local property taxes imposed by respondent on certain properties owned by the governments of India and Mongolia. The properties contain the offices of petitioners' missions to the United Nations and are used in part to house mission diplomats and other employees at a rank below that of Permanent Resident or Consul General. Respondent contends that, under New York law, the part of the properties used for such housing is tax-

able. Pet. App. 1a-3a; N.Y. Real Prop. Tax Law § 418(1) (McKinney 2000).

Respondent seeks recovery of $16.4 million in unpaid taxes and interest from India, representing primarily real estate taxes imposed between 1991 and 2003. J.A. 76.[1] Respondent seeks recovery of $2.1 million from Mongolia, representing real estate taxes imposed between 1980 and 2003. J.A. 87. Respondent also seeks a declaratory judgment in both actions establishing the validity of tax liens on the properties due to petitioners' failure to pay the taxes levied by respondent. See Pet. App. 21 n.16.[2]

Petitioners maintain that the FSIA immunizes them from respondent's suit and, on the merits, that the property is exempt from taxation pursuant to treaty. Pet. App. 22-23, 28 n.2. Petitioners contend that the residential parts of the mission buildings are intimately connected to the missions themselves because, in light of the time differences between New York and the home countries, the governments of India and Mongolia require certain staff at the missions "to be available day and night to respond to inquiries and communications from the Ministry and transmit reports about developments at the United Nations to the Ministry." Pet. Br. 2, 3.

3. The district court denied petitioners' motions to dismiss the claims as barred by foreign sovereign immunity. Pet. App. 25-45. The court held that it possessed jurisdiction

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[1] Respondent also seeks to collect certain amounts for sidewalk repair and elevator charges relating to the property. See J.A. 74-76.

[2] Respondents initially sought to foreclose on the properties. See J.A. 71 (requesting a "Judgment of Foreclosure"); J.A. 80 (same); N.Y.C. Admin. Code § 11-354 (2003) (authorizing city to maintain an action to foreclose a tax lien by, *inter alia*, selling property subject to tax lien "to the highest responsible bidder"). However, respondent conceded in the court of appeals that it would not be able to execute a judgment against the properties, see C.A. Br. 31-32, because execution would be barred by the FSIA, see 28 U.S.C. 1609-1611.

over respondent's claims pursuant to the FSIA's "immovable property" exception, 28 U.S.C. 1605(a)(4). Pet. App. 21.[3]

The court of appeals affirmed. Pet. App. 1-24. It construed Section 1605(a)(4)'s exception for claims in which "rights in immovable property * * * are in issue" to extend to cases involving three types of issues: "(1) the foreign country's rights to or interest in immovable property situated in the United States; (2) the foreign country's use or possession of such immovable property; or (3) the foreign country's obligations arising directly out of such rights to or use of the property," including "obligations * * * imposed by the local government as part of its property law regime." *Id.* at 17-18 & n.13.

The court of appeals found the text of the immovable property exception to be "ambiguous." Pet. App. 8. Although the court noted that the State Department construed the provision not to apply to claims to recover unpaid taxes or to declare the validity of a tax lien, the court held that that interpretation was not entitled to deference. *Id.* at 22 n.17. Instead, the court interpreted Section 1605(a)(4) to be "synonymous to" a provision of the European Convention on State Immunity that abrogates immunity for all claims involving "obligations arising out of [the state's] rights or interests in, or use or possession of, immovable property," *id.* at 13-14 (quoting European Convention on State Immunity (European Convention), *done* May 16, 1972, art. 9, 1495 U.N.T.S. 181, 184). The court also relied on a similar provision in Article 13 of the United Nations Convention on Jurisdictional Immunities of States and Their Properties (U.N. Convention), *opened for signature* Jan. 17, 2005, 44 I.L.M. 803, 808 (not in force),

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[3] The court declined to reach respondent's alternative argument that the court possessed jurisdiction under the commercial activity exception to immunity, 28 U.S.C. 1605(a)(2). Pet. App. 21. The court of appeals also declined to address that theory of jurisdiction. *Id.* at 5.

a Convention that post-dates the FSIA by nearly 20 years and that the United States has not signed. Pet. App. 14 n. 9, 15 n.10.

SUMMARY OF ARGUMENT

The FSIA's "immovable property" exception, 28 U.S.C. 1605(a)(4), permits a district court to exercise jurisdiction over a foreign sovereign in a case in which "rights in immovable property situated in the United States are in issue." That provision confers jurisdiction over disputes regarding "rights in" the property itself, such as title, easements, or possession. It does not authorize courts to adjudicate disputes regarding one state's authority to tax the property of the other. The court of appeals' construction of the exception to permit claims to collect unpaid property taxes and to declare the validity of a tax lien is at odds with the provision's text, historical practice, and current international practice.

The real property exception pre-dates not only the FSIA, but also the United States' adoption of the restrictive theory of immunity. Thus, it should be construed in a manner consistent with its acceptance by even those who espoused an "absolute" view of foreign state immunity. As indicated by the commentary of legal scholars and judicial opinions, the real property exception grew out of the "necessity" that a sovereign be able to determine all issues relating to the title and possession of property within its realm, and was limited to suits of that nature. The absence of any pre-FSIA suit adjudicating a tax claim against an unconsenting foreign sovereign demonstrates that there is no similar "necessity" for domestic courts to resolve such disputes. To the contrary, disputes between sovereigns regarding the susceptibility of property to taxation are properly resolved on a state-to-state basis.

Those judicial decisions applying the real property exception since its codification in the FSIA also reflect its narrow

scope. Consistent with the exception's text and historical practice, those decisions have construed Section 1605(a)(4) to allow only suits in which ownership, use, or possession of the property itself is in issue. The only court of appeals decision to address application of the exception to a tax claim (before the decision in this case) also held that, because a tax claim does not relate to ownership, use, or possession of the property, it does not fall within the scope of Section 1605(a)(4). A lien does not represent a right in the property itself, but instead provides security for the lien-holder's true interest, which is a money debt. Notably, under New York law, a property owner may redeem its property, and discharge a lien, by paying the money debt at any time before foreclosure.

The court of appeals' reliance on the real property exceptions contained in the European and United Nations conventions, to which the United States is not a party, was in error. Section 1605(a)(4) conspicuously omits the broadly-phrased provisions of those conventions on which the court of appeals relied. In any event, the court of appeals' interpretation of those conventions was in error. Neither encompasses a claim for unpaid taxes or one based on a tax lien on real property owned by a foreign state and used for governmental purposes. Significantly, the Vienna Convention on Diplomatic Relations, to which the United States is a party and which is referred to in the FSIA's legislative history, has a real property exception that would exclude tax claims such as those at issue here.

ARGUMENT

A. Tax Claims Are Not Rights In Immovable Property, And Thus Fall Outside The Text Of Section 1605(a)(4)

Section 1605(a)(4) establishes an exception to the general rule of foreign state immunity for cases in which "rights in immovable property * * * are in issue." 28 U.S.C. 1605(a)(4). The textual requirement that "rights in" real property must

actually be "in issue" makes clear that rights of ownership, use, or possession of the property must be at stake in order for the exception to apply. See *Fagot Rodriguez* v. *Republic of Costa Rica*, 297 F.3d 1, 13 (1st Cir. 2002) ("[T]he immovable property exception applies only in cases in which rights of ownership, use, or possession are at issue.").[4]

A local government's interest in taxing a foreign state's real property is not a "right in" that property in any ordinary meaning of the term. Nor is it reasonable to construe that term, as the court of appeals did, to reach all "obligations arising directly out of such rights to or use of the property," including "obligations * * * imposed by the local government as part of its property law regime." Pet. App. 17-18 & n.13. Section 1605(a)(4) speaks of "rights," not "obligations," and specifically of rights "in" property, not broadly of obligations arising out of a foreign sovereign's relationship to the property. The plain language of the text is inconsistent with an interpretation of the provision as applying to a dispute over unpaid taxes.[5]

B. The Historic Origins Of The Real Property Exception Confirm Its Narrow Scope

In determining the scope of the FSIA's exceptions to immunity, it is appropriate to look to the meaning generally given to those exceptions at the time the statute was enacted. See *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 613

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[4] As discussed below, see pp. 20-24, *infra*, the exception encompasses claims regarding the "use" of property only in the sense that they involve traditional property rights to use of the property, such as easements, not in the broad sense employed by the court of appeals—"obligations arising directly out of such * * * use of the property," Pet. App. 17-18.

[5] Congress used broad "arising out of" language in the FSIA when it so intended, as in the immunity exception for domestic torts that immediately follows the real property exception. See 28 U.S.C. 1605(a)(5)(B).

(1992); see also *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, J.) (Section 1605(a)(4) should be interpreted by reference to "the pre-existing real property exception to sovereign immunity recognized by international practice" at the time the FSIA was enacted), cert. denied, 470 U.S. 1051 (1985). Reference to historic practice is particularly appropriate to determine the scope of the real property exception, which was "accepted by writers as early as Grotius." Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* 237 (2d ed. 1998).

1. The court of appeals based its analysis of Section 1605(a)(4) on the mistaken premise that the real property exception had its roots in the notion that ownership of real estate in a foreign country must be considered a private act. Pet. App. 9. That characterization conceives of the real property exception as one manifestation of the restrictive theory of immunity "that animates the Tate Letter." *Ibid.* However, the real property exception predated the United States' acceptance of the restrictive theory, and was, in fact, agreed to "by proponents of both [the absolute and restrictive] theories" of immunity. Tate Letter (*Alfred Dunhill*, 425 U.S. at 711). Thus, the exception should be construed not in light of the relatively recent distinction between public or private acts, but in light of the principles that motivated acceptance of the exception among even those who adhered to an otherwise absolute view of foreign state immunity in the era before the Tate Letter.[6]

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[6] The court of appeals cited *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), as supporting a distinction with respect to immunity between a foreign sovereign's public and private acts. Pet. App. 16-17. To the contrary, as this Court has observed, *The Schooner Exchange* "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden*, 461 U.S. at 486.

Even outside the immunity context, "[i]t is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." *United States* v. *Fox*, 94 U.S. 315, 320 (1877). See *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 12 (1823) (Story, J.) ("Every government has, and from the nature of sovereignty must have, the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries."). The real property exception is likewise rooted in the principle "that land is so indissolubly connected with the territory of a State that the State of the situs cannot permit the exercise of any other jurisdiction in respect thereof." Advisory Comm. of the Research in Int'l Law, *Codification of International Law*, 26 Am. J. Int'l L. Supp. 1, 578 (1932) (Harvard Research draft); Denza 237 (citing Cornelius Van Bynkershoek, *De Foro Legatorum* (1702)). The exception thus reflects the territorial sovereign's "primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes*, 735 F.2d at 1521.[7]

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[7] As then-Judge Scalia recognized in *Asociacion de Reclamantes*, similar considerations also underlie "the 'local action rule,' which makes the locality's power exclusive and deprives other courts of jurisdiction to settle questions involving real estate." 735 F.2d at 1521-1522. At common law, local actions were limited to the adjudication of "rights of real property," *Rafael* v. *Verelst*, 96 Eng. Rep. 621, 622 (K.B. 1776) (DeGrey, C.J.); Joseph Story, *Commentaries on the Conflict of Laws* 457-458 (1834) (explaining that local actions were *in rem* in nature, and did not give rise to jurisdiction over the person whose rights were adjudicated). Even in modern practice, in which the local action rule is principally a function of statutory law and varies somewhat among jurisdictions, the doctrine is typically understood—like the immovable property exception—to be "limited to questions that directly implicate interests in the

There is no sense in which the "necessity of the case," *Fox*, 94 U.S. at 320, requires the courts of one state to adjudicate a dispute between it and another sovereign as to whether international law permits the former to tax the diplomatic property of the latter. Indeed, the absence, conceded by respondent (Br. in Opp. 15), of any instance of a court's exercising such jurisdiction before the FSIA's enactment would seem to be conclusive evidence that there is no "necessity" for the adjudication of cases of that sort in a state's domestic courts.

2. Pre-FSIA legal scholarship described the real property exception to foreign sovereign immunity in narrow terms that would exclude a claim seeking to recover unpaid taxes on real property. The Restatement (Second) of Foreign Relations Law of the United States (Second Restatement), for example, published in 1965, stated that the exception permitted "actions for the determination of possession of, or an interest in, immovable or real property located in the territory of a state exercising jurisdiction." *Id.* § 68 cmt. d at 207. Underscoring the narrow scope of the exception, the Second Restatement explained that it did not include "a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession." *Ibid.*; see also 6 Marjorie M. Whiteman, *Digest of International Law* 638 (1968) (quoting Second Restatement).[8]

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property or rights to possession." *Asociacion de Reclamantes*, 735 F.2d at 1522.

[8] The Restatement (Third) of Foreign Relations Law of the United States (1987) (Third Restatement), which post-dates the FSIA by more than a decade, is obviously a less relevant source for interpreting the Act than is the Second Restatement. The Third Restatement asserts that, in addition to "controversies relating to rights of ownership, possession, occupation, or use," the immovable property exception extends "as well" to "controversies concerning payment of rent, taxes, and other fees concerning" foreign state property. 1 Third Restatement § 455 cmt. b at 412. That statement, for which the Third Restatement offers no authority, appears to be aspirational rather than a

Similarly, a leading American treatise on international law explained in 1945 that the exception permitted a court to exercise jurisdiction to resolve "questions pertaining to title or the adverse interests of individual claimants." 2 Hyde 848. Another treatise, published in 1933, similarly described the exception, in European practice, as limited to actions "*in rem*," such as actions brought to determine "ownership, boundaries, partitions, possession," and the succession of property left to the foreign state. Eleanor Wyllys Allen, *The Position of Foreign States before National Courts, Chiefly in Continental Europe* 44, 70.[9]

Indeed, even the "very broad" immovable property exception proposed in 1932 by the Harvard Research draft convention on foreign state immunity would have limited a court's jurisdiction to proceedings "relat[ing] to rights or interests in, or to the use of, immovable property." 26 Am. J. Int'l L.

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statement of existing law. The Second Circuit has cautioned courts against uncritical reliance on the "controversial" Third Restatement. *United States* v. *Yousef*, 327 F.3d 56, 100 n. 31, cert. denied, 540 U.S. 933 (2003). That admonition is particularly appropriate where the Third Restatement seeks to broaden a rule after Congress has acted.

[9] Allen noted a distinction between "'real' actions affecting the immovable property, where the jurisdiction is absolute," and suits "only incidentally concerned therewith, where jurisdiction may or may not be assumed, according to the general policy of the courts regarding public and private acts of a foreign state." Allen 15. The FSIA's real property exception reflects the former, which was accepted even within the otherwise absolute theory of immunity, whereas the latter exception, which reflects the restrictive theory, is embodied in other provisions of the FSIA, such as the FSIA's commercial property exception, 28 U.S.C. 1605(a)(2).

Supp. at 456 (art. 9).[10] This proposed exception—which the accompanying commentary makes clear went beyond established international practice at that time—would have permitted only litigation related to property rights such as fee ownership, possession, or interests such as "leasehold, joint-tenancy or tenancy in common, contingent interests, life interests and the like." *Id.* at 572-573. It would have extended jurisdiction to a broader range of disputes involving use of the property. Nonetheless, even that aspect of the Harvard Research draft's proposal would not have encompassed the broad exception articulated by the court of appeals, and certainly not a tax claim. The commentary made clear that the draft's reference to claims involving "use" of real property concerned nuisance-type claims where one owner uses his property in a way that interferes with his neighbor's use or possession of his property. See *id.* at 573 (offering example of state's operation of factory that interferes with neighbor's right of peaceful enjoyment to his residence). Significantly, the commentary acknowledged that judicial precedent did not support an exception even to that extent, much less one that would permit adjudication of an inter-sovereign dispute regarding tax liability. See *id.* at 573 (Austrian court rejected suit for injunction against Germany relating to its construction on property); *id.* at 580-583 (German court dismissed suit against Poland for damages and injunction to remove coat of arms from building in which its consulate leased space).

3. Pre-FSIA case law also demonstrates that there was no historical exception to foreign sovereign immunity for the

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[10] The Harvard Research draft "represented the work of a number of eminent international legal scholars," and "[i]ts weight was highly persuasive as a *projection* of where the law concerning diplomatic and consular immunities was believed *to be headed*." Note, *The Immunity of Foreign Consulate Property from Real Property Taxation: United States v. Glen Cove*," 38 Alb. L. Rev. 976, 977 (1974) (emphasis added).

adjudication of tax claims. Respondent acknowledges that "prior to the enactment of the FSIA, no court exercised jurisdiction over a real property tax" claim of the kind it asserts here, but contends that the absence of historical precedent for its suit "is of no significance, because it is also true that no court during that period declined to exercise such jurisdiction." Br. in Opp. 15-16. In fact, there are cases in which such jurisdiction was asserted but refused. See pp. 14-15, *infra*. Moreover, the conceded absence of cases in which jurisdiction was exercised over such a claim is, in itself, quite significant. The exception upon which respondent relies is one that was "accepted by writers as early as Grotius," Denza 237, and acknowledged by proponents of the "absolute" theory of immunity, see Tate Letter (*Alfred Dunhill*, 425 U.S. at 711). It is incumbent upon respondent to demonstrate that a suit to establish a foreign state's tax liability would have been recognized as falling within that non-controversial exception. But respondent can do nothing of the kind. Rather, in each case that does address a state's ability to impose or adjudicate a tax liability against real property, the holding was adverse to the municipality.[11]

In at least two instances in which municipalities did bring suit to foreclose on tax liens, one *in personam* and the other *in rem*, the courts dismissed the suits as barred by sovereign

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[11] The court of appeals cited the cases of *Republic of Argentina* v. *City of New York*, 250 N.E.2d 698 (N.Y. 1969), and *United States* v. *City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y.), aff'd, 450 F.2d 884 (2d Cir. 1971) (per curiam), as making it "clear that, at the time of the FSIA's enactment, courts had jurisdiction to hear disputes such as this one." Pet. App. 17 n.12. Neither case involved a suit *against* an unconsenting foreign state, and thus neither presented a question of the foreign sovereign's immunity from the courts' jurisdiction. In the former, the Republic of Argentina sued to have the city's tax liens declared invalid, 250 N.E.2d at 699, and in the latter the United States sued to have tax liens on the Soviet Union's diplomatic residence discharged, 322 F. Supp. at 150, 155.

immunity. See *City of New Rochelle* v. *Republic of Ghana*, 255 N.Y.S.2d 178 (County Ct. 1964); *Knocklong Corp.* v. *Kingdom of Afghanistan*, 167 N.Y.S.2d 285 (County Ct. 1957). In *Knocklong*, the plaintiff, who held a tax deed for property used as the residence of the Kingdom of Afghanistan's principal representative to the United Nations, brought *in personam* claims against the Kingdom and U.N. representative to determine title to the property. *Id.* at 286. On the basis of the State Department's suggestion of sovereign immunity, the court dismissed the claims. *Id.* at 286-287. In *City of New Rochelle*, the court, on the basis of the State Department's suggestion of immunity, dismissed the municipality's *in rem* actions to foreclose on tax liens against real property owned by several foreign countries and used to house their principal representatives to the United Nations. 255 N.Y.S.2d at 179-180. The court noted that "the overwhelming weight of opinion holds that jurisdiction over proceedings such as these should not be exercised." *Id.* at 180.[12]

The lack of jurisdiction over tax claims against foreign sovereigns was often cited as a reason not to tax the property of foreign sovereigns in the first place. One reason commentators gave for exempting foreign sovereigns from property taxes was "the impossibility of collecting any taxes, since for-

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[12] Although the dismissal in *City of New Rochelle* case appears to have been premised on the immunity of the foreign state's diplomatic property, rather than the immunity of the foreign state itself, that fact does not diminish its relevance to the question whether tax claims were recognized as falling within the real property exception. That exception to immunity was, after all, generally regarded as being limited to "jurisdiction *in rem* over [the] property" itself. Allen 70. See Denza 238 (Vienna Convention on Diplomatic Relations' immunity exception for a "real action is equivalent to an action *in rem*" for "title or possession"). The more aspirational Harvard Research draft, in contrast, took the view that "[i]t is not considered desirable to limit such proceedings to what are known in some legal systems as 'real actions' or 'actions *in rem*.'" 26 Am. J. Int'l L. Supp. at 573.

eign states and their property are not subject to suit or judicial process." William W. Bishop, Jr., *Immunity from Taxation of Foreign State-Owned Property*, 46 Am. J. Int'l L. 239, 256 (1952); see *id.* at 242 (quoting 5 Op. Att'y Gen. Mass. 446 (1920) ("[E]ven in the event that a tax [on personal property] were valid, no proceedings could be had in any court in the Commonwealth to enforce its payment, either against the foreign government or the property taxed so long as it was owned by that government. This fact alone strongly indicates that it was never intended by our statutes to impose such a tax.")).

In *Republic of Argentina* v. *City of New York*, 250 N.E.2d 698 (1969), the New York Court of Appeals held that property of Argentina used for consular affairs was immune from taxation. *Id.* at 704. The court rested its decision, in part, on the fact that "it would be difficult, if not impossible, to enforce the collection of any tax levied against a friendly foreign government if the latter were not disposed to pay it." *Id.* at 701. Because "no sovereign state can itself be sued without its consent, and its governmental property is not susceptible to attachment, levy or seizure by the courts or other authorities of a foreign country," the court regarded levy of the tax as "a futile gesture." *Id.* at 701-702. The court went on to reject the very contention that is the central premise of respondent's arguments in this suit—that the city's "claims for unpaid taxes constitute a lien on the property upon which it would be able to act when and if the foreign government disposes of the premises." *Id.* at 702. The city, the court held, had "no power to transform its tax claim into a lien." *Ibid.* "Just as it may not compel the payment of a tax by proceeding directly against the plaintiff's property, its imposition of a lien, which would affect the property indirectly * * *, would constitute an impermissible exercise of jurisdiction over another state's property." *Ibid.* Cf. *The Western Maid*, 257 U.S. 419, 432-434

(1922) (rejecting contention that "dormant" maritime liens arose against ships in the possession of the United States that "became enforcible [*sic*] as soon as the vessels came into hands that could be sued"). The court therefore affirmed the grant of summary judgment in Argentina's favor discharging the city's tax liens. *Republic of Argentina*, 250 N.E.2d at 699, 704.[13]

A decision by the Supreme Court of Canada in 1943 similarly indicates that, pre-FSIA, a foreign state was immune from suit to collect municipal taxes as well as from liens on its property as a means of securing payment. *In re Reference as to The Powers of Ottawa and Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208 (Can.). That court held that a municipality could not levy taxes on properties of foreign sovereigns used as legations. Chief Justice Duff explained that the courts "are without jurisdiction" over a tax dispute against a foreign state and also rejected the notion that the tax could, like a lien, "stand as against the purchaser" of the property because such a charge "would be the assertion of 'a right' * * * 'over the property of a foreign sovereign.'" *Id.* at 229-230 (quoting *The Tervaete*, [1922] P. 259, 272 (Eng. C.A.) (opinion of Scrutton, L.J.)). See *id.* at 233 (opinion of Rinfret, J.) (city cannot "create any effective charge upon the property" because such "would only mean an indirect way of coercing the foreign State"); *id.* at 249 (opinion of Tashereau, J.) (concurring in opinion of Duff, C.J.).[14]

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[13] The Court of Appeals of Kentucky similarly reasoned that tobacco owned and possessed by France could not be subjected to a municipal tax because "[i]t is conceded that the French Republic is not suable in our courts without its consent, and that the tobacco itself cannot be subjected to the payment of the tax." *French Republic* v. *Board of Supervisors*, 252 S.W. 124, 125 (1923).

[14] In *Republic of France* v. *City of New York*, the New York Supreme Court refused to discharge tax liens on real property owned by a New York

C. The FSIA Did Not Expand The Real Property Exception To Encompass Tax Suits Such As This

Notwithstanding the absence of any pre-FSIA precedent of a court's exercising jurisdiction over an unconsenting foreign state to establish a property tax liability, respondent contends that the FSIA's real property exception does confer such jurisdiction. But Section 1605(a)(4) codified, rather than expanded, the exception. As the cases construing that section confirm, the statutory exception, like its historical predecessor, is limited to claims that assert a right to ownership, use, or possession of property. A tax lien is not a right in property, but rather represents security for a debt, whether conceded or merely alleged. Moreover, to allow respondent to establish jurisdiction based on an asserted lien against petitioners' property would run afoul of the FSIA's prohibition on attachments in aid of jurisdiction.

1. Before the instant litigation, only two courts had addressed the question whether the FSIA's real property exception encompasses property tax claims. The Third Circuit held that it does not. *City of Englewood* v. *Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (1985). The court considered both the text and legislative history of Section 1605(a)(4), as well as other judicial decisions construing it, and concluded that the "exception deals with the recognized principle of in-

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corporation that was in turn owned by the Republic of France. See 74 N.Y.L.J. 1279 (1925) (reprinting decision by Justice Riegelmann). Because the suit was brought by the foreign state to remove the liens, no issue of foreign state immunity was presented. Moreover, because the property was owned by a separate corporate entity, created under the laws of New York, France's sovereign immunity would not have been extended to the corporation under the separate entity doctrine then applied by many courts. See, *e.g.*, *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 202 (S.D.N.Y. 1929). Accord 28 U.S.C. 1603 (excluding from definition of "foreign state" any "separate legal person" that is "a citizen of a State of the United States").

ternational law that a sovereign may resolve disputes over title to real estate within its geographic limits," and thus is "limited to disputes directly implicating property interests or rights to possession." *Id.* at 36 (quoting *Asociacion de Reclamantes*, 735 F.2d at 1522).[15] In contrast, a district court held, without analysis of the text, history, or intended scope of the exception, that the question of the validity of an asserted tax lien was a right in property within Section 1605(a)(4). *County Bd. of Arlington County* v. *Government of the German Dem. Rep.*, Civ. No. 78-293-A (E.D. Va. Sept. 6, 1978) (*reprinted in* 17 I.L.M. 1404 (1978)). Notably, that decision became the subject of diplomatic negotiations with the German Democratic Republic, and the Fourth Circuit subsequently held, in litigation brought by the United States, that the foreign state's property was immune from taxation and from execution of any tax lien. *United States* v. *County of Arlington*, 669 F.2d 925 (4th Cir.), appeal dismissed, cert. denied, 459 U.S. 801 (1982). Thus, the district court's ruling offers little support to respondent.

Moreover, like the Third Circuit in *Englewood*, other appellate decisions construing Section 1605(a)(4) have rejected the broad construction adopted by the court of appeals in this case, holding instead that the exception is limited to a narrow class of claims involving title, possession, or similar property interests. Those courts have recognized that the exception

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[15] The United States filed a brief *amicus curiae* in the *Englewood* case supporting rehearing en banc and stating the view that Section 1605(a)(4) "include[s] actions for property taxes." U.S. *Amicus* Br. at 10, *City of Englewood*, *supra* (No. 84-5746). That brief did not examine pre-FSIA practice with respect to the historical real property exception. Rather, the brief was premised on the mistaken understanding that the real property exception in the European Convention, art. 9, 1495 U.N.T.S. at 184, would permit such claims and an attempt to harmonize the FSIA with that Convention. U.S. *Amicus* Br. at 8-10, *City of Englewood*, *supra* (No. 84-5746). As discussed at pp. 28-29, *infra*, that Convention does not permit adjudication of tax claims.

"was not intended broadly to abrogate immunity for any action touching upon real estate," *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir.), modified, 823 F.2d 606 (D.C. Cir. 1987), but is limited to "cases in which rights of ownership, use, or possession are at issue," *Fagot Rodriguez*, 297 F.3d at 13. See, *e.g.*, *Asociacion de Reclamantes*, 735 F.2d at 1520-1522 & n.5 (noting that Section 1605(a)(4) is focused on disputes over "title and possession"). Those courts have rejected a claim for "purely compensatory rights," such as unpaid rent, *Fagot Rodriguez*, 297 F.3d at 11, and nuisance, *MacArthur Area Citizens*, 809 F.2d at 921, even if, in the words of the court of appeals in this case, those claims relate to "the foreign country's obligations arising out of [its] rights to or use of the property." Pet. App. 17-18.[16]

The court of appeals attempted to distinguish *Fagot Rodriguez* and *MacArthur Area Citizens* on their facts, observing that, unlike this case, no ongoing property dispute existed at the time the courts of appeals ruled. See Pet. App. 19 n.14. That distinction is not persuasive. In each case, the court made clear that jurisdiction would have been appropriate only if the plaintiff had made some claim *to the property itself*. See *Fagot Rodriguez*, 297 F.3d at 13 (rental disputes "unaccompanied by issues of ownership, possession, or use" are not within the exception); *MacArthur Area Citizens*, 809 F.2d at 921 (emphasizing that plaintiff "makes no claim to any interest in that property"). Thus, the supposed distinction advanced by

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[16] In *Asociacion de Reclamantes*, the District of Columbia Circuit held that claims arising out of the alleged taking and conversion of certain land grants did not fall within the exception. 735 F.2d at 1522-1524. The court stated in dictum that an interpretation of Section 1605(a)(4) as limited to disputes directly implicating property interests or rights to possession was consistent with the district court's decision in *Government of the German Democratic Republic*, discussed above. *Id.* at 1522.

the court below is merely a feature of happenstance, not a distinction of jurisdictional significance.

2. The court of appeals disavowed reliance on the fact that respondent seeks in this litigation to establish the validity of a tax lien. See Pet. App. 21 n.16 (respondent's tax lien "is irrelevant to our analysis"). Rather, the court claimed broad jurisdiction to adjudicate "the extent of defendants' obligations under local law (here, property taxes) arising directly out of their ownership of real property in the United States." *Id.* at 21. In this Court, however, respondent seeks (Br. in Opp. 15) to defend the judgment below on the ground that its claim of a tax lien constitutes a "right in immovable property" within the scope of Section 1605(a)(4). That contention fails because a statutory tax lien is not a "right in" property, and jurisdiction on that basis would improperly circumvent the FSIA's prohibition on pre-judgment attachment as a means of obtaining jurisdiction over a foreign state.

a. Section 1605(a)(4) is limited to cases in which "rights in immovable property * * * are in issue." As this Court has recognized, a lien does not itself establish any property right, but is "merely a means to the end of satisfying a claim for the recovery of money." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262 (1999); see *Ward* v. *Chamberlain*, 67 U.S. (2 Black) 430, 437 (1863) ("a lien on land constitutes no property or right in the land itself"); *Weinstein* v. *Taylor*, 234 N.Y.S.2d 926, 926 (Sup. Ct. 1962) (tax lien is not an "estate or interest in real property") (quoting *Leonard* v. *Schwartz*, 100 N.Y.S.2d 802, 803 (App. Div. 1950)), aff'd, 242 N.Y.S.2d 707 (App. Div. 1963); 5 Restatement (First) of the Law of Property § 540 cmt. a, at 3238 (1944) (First Restatement) ("the lien constitutes merely additional security for the performance of the promise"); see also *Massingill* v. *Downs*, 48 U.S. (7 How.) 760, 767 (1849) ("A judgment lien on land constitutes no property or right in the land itself," but "only confers a right to

levy on the same, to the exclusion of other adverse interests subsequent to the judgment") (quoting *Conard* v. *Atlantic Ins. Co.*, 26 U.S. (7 Pet.) 386, 443 (1828) (Story, J.)); *Conard*, 26 U.S. at 443 (same); 5 Richard R. Powell, *Powell on Real Property* § 38.02[2], at 38-7 (Mar. 1996) (judgment lien "is not an estate in the debtor's land").[17]

In support of its argument that Section 1605(a)(4) encompasses tax liens, respondent cites (Br. in Opp. 15 n.16), as did the court of appeals (Pet. App. 10-11), a reference in the legislative history of Section 1605(a)(4) to "questions of ownership, rent, servitudes, and similar matters," H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20 (1976). It is far from clear that the House Report reference to "rent" signifies an intent to expand the preexisting real property exception to include, for example, a new category encompassing all monetary claims relating to real property. See *Fagot Rodriguez*, 297 F.3d at 11 (rejecting non-possessory claim for back rent); *Asociacion de Reclamantes*, 735 F.2d at 1522 n.5. Moreover, the extensive diplomatic consequences for the United States, host of, *inter alia*, the United Nations and Organization of American States, that would flow from a significant expansion of the property exception would surely need to rest on a firmer foundation than a single reference in a House Report. In any event, the quoted language does not encompass an action to establish the validity of a lien, which is not "rent," a "servitude[ ]," or "similar matter."

Early common law did not even recognize a lien on land. 5 Herbert Thorndike Tiffany, *The Law of Real Property* § 1559, at 650 (3d ed. 1939). It also distinguished clearly be-

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[17] That is not to say that a lien is not itself "property," but only that it is not among the "rights in immovable property" specified in 28 U.S.C. 1605(a)(4). Cf. *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983) (noting that debtor's property subject to tax lien was part of debtor's estate, and that holder of tax lien could not resort to the "remedy of possession").

tween a lien and a servitude (or "servient tenement"), the latter constituting a direct interference with the ownership, possession, or use of one's land. See 3 Tiffany §§ 756, 758, at 200-201, 203-204; see also 5 First Restatement of Property § 450 & cmt. a, § 455, at 2901-2903, 2919. A lien is different in important respects from rights in immovable property such as covenants, easements, or servitudes. For example, an order to sell property in bankruptcy free and clear of all liens, claims, encumbrances, and rights "does not indicate that the property is to be sold free and clear of non-monetary restrictions of record which run with the land," such as servitudes. *In re Oyster Bay Cove, Ltd.*, 161 B.R. 338, 343 (Bankr. E.D.N.Y. 1994), aff'd 196 B.R. 251 (E.D.N.Y. 1996).

Enforcement of a lien is also quite different from enforcement of a servitude or other right in property. Whereas a person suing for title, possession, or enforcement of a servitude seeks an immediate interest in the property itself, a lien holder's primary claim is to the payment of a debt. The lien uses real property as leverage, but it does not amount to an interest in the real property itself. Under New York law, for example, the property owner "has a right to redeem at any time before an actual sale under a judgment of foreclosure." *NYCTL 1996-1 Trust* v. *LFJ Realty Corp.*, 763 N.Y.S.2d 836, 837 (App. Div. 2003) (quoting *United Capital Corp.* v. *183 Lorraine St. Assocs.*, 675 N.Y.S.2d 543, 543-544 (App. Div. 1998)).

In sum, the lien provides a mechanism by which the lienholder can secure payment, but it is not itself a right in real property. Especially in light of the historical origins of the immovable property exception, it is clear that a lien is not a "similar matter" to ownership of property, servitudes on the

land, and even rents.[18] It is one thing to ensure that foreign sovereign immunity does not prevent adjudication of title and covenants in real property—matters at the heart of the domestic sovereign's "primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes*, 735 F.2d at 1521. It is quite another to expand the exception to cover debt collection efforts that attempt to use the property as a security.[19]

b. Respondent's reliance on the existence of a statutory tax lien against petitioners' property as the basis of the court's jurisdiction would also be inconsistent with the FSIA's elimination of the prior practice of obtaining jurisdiction over a foreign state through attachment of its property. See H.R. Rep. No. 1487, *supra*, at 26-27 (FSIA was intended to end the practice of permitting "an attachment for the purpose of obtaining jurisdiction over a foreign state or its property"). The FSIA explicitly prohibits pre-judgment attachment as a means of establishing jurisdiction, see 28 U.S.C. 1609,

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[18] Indeed, in some states, a statutory tax lien on real property arises from unpaid taxes on *personal* property. See 5 Powell § 39.04[2], at 39-39 (June 2004). New York law creates many other liens related to real property, including an emergency repair lien; relocation lien; pest control lien; housing violations and civil penalty lien; canopy lien; leaking tap lien; building inspection fees lien; sidewalk repair lien; and environmental control board lien. See Melvyn Mitzner, *Liens and Encumbrances, in Real Estate Titles* 301, 311-314 (James M. Pedowitz ed., 1984). In fact, it appears that some of the monies sought to be recovered from the Permanent Mission of India involve sidewalk repair charges and elevator taxes. Surely Congress did not intend to abrogate immunity with respect to this broad array of municipal claims by its reference to "rights in immovable property" in Section 1605(a)(4).

[19] In the United States' experience, when taxes are assessed against properties that are indisputably subject to taxation, foreign governments generally pay those taxes. Where, however, a dispute arises as to whether international law permits a certain property to be taxed, the dispute is appropriately resolved through diplomatic means, rather than litigation in the courts of one state or the other.

1610(d)(2), and provides that a district court has *in personam* jurisdiction over the foreign state for any claim that falls within a statutory exception to immunity.[20] Indeed, the FSIA significantly limits the measures of restraint against sovereign property that a court can impose even in the event of a judgment. See 28 U.S.C. 1610(a)(4)(B); 28 U.S.C. 1610(a).[21]

Permitting jurisdiction over a foreign state by virtue of the existence of a statutory restriction on the property is not consistent with Congress' intent to eliminate *quasi in rem* jurisdiction based on pre-judgment attachment in favor of *in personam* jurisdiction over the foreign state. A city cannot,

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[20] Notably, the only FSIA provision pertaining to liens, the exception from immunity for a suit in admiralty to enforce a commercial maritime lien, converts the claim into an *in personam* action against the foreign state and does not allow arrest of the vessel. 28 U.S.C. 1605(b); H.R. Rep. No. 1487, *supra*, at 21-22.

[21] The FSIA provides that a foreign state's property "shall be immune from attachment[,] arrest and execution except as provided in sections 1610 and 1611 of this chapter," 28 U.S.C. 1609, and further provides that "[n]o attachment or execution" that the statute otherwise allows "shall be permitted until the court has ordered such attachment and execution * * * following the entry of judgment," 28 U.S.C. 1610(c), with certain exceptions relating to commercial property, 28 U.S.C. 1610(d). As explained in the text, the pre-judgment lien claimed by respondent in this case, which assertedly was imposed against petitioners' property by operation of state law, not court order, could not itself furnish a basis for jurisdiction of this action. The underlying validity of that asserted lien is not before the Court. Compare *Republic of Argentina*, 250 N.E.2d at 702 ("imposition of a lien * * * would constitute an impermissible exercise of jurisdiction over another state's property"), and *United States* v. *Ausonia Brass & Copper Co.*, 218 U.S. 452, 471 (1910) (noting the common law prohibition on "contractors for labor and material to take liens upon the public property of the United States"), with 28 U.S.C. 1604 (FSIA confers immunity from 'the jurisdiction of the courts"). If a non-judicial lien was imposed on a foreign state's property that it regarded as improper, its only remedies would be to sue to have the lien declared invalid, which could open it to counterclaims as to which it would otherwise be immune, see 28 U.S.C. 1607, or to request the United States to sue on its behalf, see *City of Glen Cove*, *supra*.

through the mere statutory declaration of a lien or other self-help measure, create jurisdiction over a foreign state.

D. International Conventions On State Immunity Exclude Claims For Unpaid Property Taxes Or A Tax Lien

1. Courts have routinely recognized the propriety of consulting international practice at the time of the Act's passage in construing the FSIA's provisions. See *Asociacion de Reclamantes*, 735 F.2d at 1521 ("[t]he immovable property exception [in Section 1605(a)(4)] was enacted to codify * * * the pre-existing real property exception recognized in international practice"). One of the two international conventions discussed in the legislative history of the FSIA is the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. The United States is a party to that Convention, and the House Report on the FSIA specifically indicated that Section 1605(a)(4)'s immovable property exception was consistent with the Convention. See H.R. Rep. No. 1487, *supra*, at 20. Thus, the Vienna Convention's real action exception is relevant in construing Section 1605(a)(4).[22]

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[22] The House Report cites the Vienna Convention in the course of explaining that the scope of Section 1605(a)(4) was consistent with the Tate Letter's statement that "diplomatic and consular property" was "excepted" from the real property rule. The Report states that the Tate Letter referred only to "attachment" of or "execution" against diplomatic property, and then observes that the Vienna Convention would permit adjudication of "questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed." H.R. Rep. No. 1487, *supra*, at 20. The report does not specify whether its reference to "rent" refers only to some subset of rent claims, such as "those rent suits in which title is in dispute," as one court has hypothesized, *Asociacion de Reclamantes*, 735 F.2d at 1522 n.5, but it is in any event immaterial to this suit, which does not involve a claim for rent. Notably, the FSIA includes a separate exception for claims based on commercial activity, which would include rental agreements. Separate provisions would bar any attempt to attach or execute against foreign state prop-

The Vienna Convention contains an analogous exception to the immunity of diplomatic agents for "a *real action* relating to private immovable property situated in the territory of the receiving State, unless [the agent] holds it on behalf of the sending State for the purposes of the mission." Art. 31(a), 23 U.S.T. at 3240, 500 U.N.T.S. at 112 (emphasis added). The term "a real action" encompasses actions for "a declaration of title" or "an order for possession," but excludes "actions for recovery of rent or performance of other obligations deriving from ownership or possession of immovable property." Denza 238. These types of claims parallel the limited universe of claims that fall within the traditional real property exception. Thus, the Vienna Convention confirms the narrow meaning of Section 1605(a)(4).

2. The court of appeals based its construction of Section 1605(a)(4) on the broadly-phrased real property exceptions contained in two other international conventions. The United States is not a party to those conventions. And those conventions cannot be used, as the court of appeals did, to trump the text of the FSIA itself, especially when the conventions depart from customary practice. In any event, the court of appeals' interpretation of those conventions was in error. Neither encompasses a claim for unpaid taxes or based on a tax lien on real property owned by a foreign state and used for governmental purposes.

The court of appeals construed the phrase "rights in immovable property" to encompass all "obligations arising directly out of such rights to or use of the property," including "obligations * * * imposed by the local government as part of its property law regime," Pet. App. 17-18 & n.13. As explained above (see pp. 7-17, *supra*), that interpretation cannot

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erty used for governmental purposes based on a judgment under that exception. See 28 U.S.C. 1609-1611.

be squared with the text or historical background of Section 1605(a)(4). The court of appeals nonetheless ascribed that broad meaning to Section 1605(a)(4) because the European Convention, which the FSIA House Report also cites, includes a broad exception to that effect. But that broad exception is expressed in very different terms from the narrow exception of Section 1605(a)(4). In contrast to the FSIA, Article 9(b) of the European Convention expressly abrogates immunity for suits involving "obligations arising out of [a state's] rights or interests in, or use or possession of, immovable property." 1495 U.N.T.S. at 184; see Pet. App. 13. Article 13(a) of the U.N. Convention (which is not in force and which the United States did not sign) similarly provides an explicit exception to immunity for cases involving "any obligation of the State arising out of its interest in, or its possession or use of, immovable property." 44 I.L.M. at 808; see Pet. App. 14 n.9. Tellingly, the European and U.N. Conventions list that broader class of suits *separately* from the exception both conventions also include for proceedings relating to "rights or interests in, or its use or possession of, immovable property," European Convention, art. 9(a), 1495 U.N.T.S. at 184; U.N. Convention, art. 13(a), 44 I.L.M. at 808. That narrower exception more closely approximates the language of Section 1605(a)(4) and reinforces Section 1605(a)(4)'s narrow scope. The court of appeals erred in reading into the FSIA a separate and broader immunity exception from the European and U.N. Conventions that Congress omitted.

In any event, the court of appeals' interpretation of even the broader exception included in the European and U.N. Conventions was erroneous. Those conventions in fact do not abrogate immunity in cases to recover property taxes imposed on—or to declare a tax lien on—foreign governmental property. Article 29(c) of the European Convention explicitly *excludes* proceedings concerning "[c]ustoms duties, taxes or

penalties" from its coverage. 1495 U.N.T.S. at 190. Such claims involving public law disputes between states are outside the scope of the Convention, which "is essentially concerned with 'private law' disputes between individuals and States." Council of Europe, *European Convention on State Immunity: Explanatory Report* ¶ 113 (last visited Feb. 28, 2007) <http://conventions.coe.int/treaty/en/Reports/HTML/074.htm>. Similarly, although the International Law Commission initially included in the draft U.N. Convention both an immovable property exception and a provision waiving immunity for suits to collect taxes on real property used for commercial purposes,[23] the tax exception was subsequently deleted, with the explanation that it addressed state-to-state relations rather than the types of disputes between states and private persons that the Convention was intended to govern. See *Summary Records of the 2220th Meeting*, [1991] 1 Y.B. Int'l L. Comm'n 84 (¶ 6), U.N. Doc. A/CN.4/SER.A/CN.4/SER.A/1991. The clear implication is that the drafters of the U.N. Convention did not understand property tax claims to fall within that Convention's immovable property exception.[24]

In sum, the court of appeals broadened the exception provided Section 1605(a)(4) in order to make it consistent with the European and U.N. Conventions, despite their diverging

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[23] See *Sixth Report on Jurisdictional Immunities of States and Their Property*, Sompong Sucharitkul, Special Rapporteur, at 21-25, U.N. Doc. A/CN.4/376 (1984) (Art. 17) <http://untreaty.un.org/ilc/documentation/english/a_cn4_376.pdf>.

[24] The United Kingdom's State Immunity Act, 1978, 17 I.L.M. 1123 (1978), has a real property exception nearly verbatim to the European Convention's. *Id.* at 1125 (§ 6(1)(b)). Significantly, it has a *separate* exception for tax claims that, with respect to real property, is limited to premises occupied by the foreign sovereign "for commercial purposes." *Id.* at 1126 (§ 11(b)). Apart from Section 11, the "Act does not apply to any proceedings relating to taxation." *Id.* at 1127 (§ 16(5)).

texts. In so doing, however, the court of appeals created an exception for tax claims that is not provided by either of those conventions. The conventions, properly understood, reflect the understanding of their drafters that, even under the restrictive theory of immunity, the longstanding exception to immunity for suits involving rights in immovable property does not subject a foreign sovereign to suit on a state-to-state dispute over whether property is subject to taxation.[25]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[25] The court of appeals erroneously relied on appropriations laws enacted by Congress in 2004 and 2005 in construing the FSIA's immovable property exception. See Pet. App. 11-12. Those laws provide for the deduction from foreign aid to a country of an amount "equal to 110 percent of the * * * unpaid property taxes owed by the central government of such country" to New York City or the District of Columbia, as determined "in a court order or judgment entered against such country by a court of the United States." Act of Nov. 14, 2005, Pub. L. No. 109-102, § 543(a) and (f)(4), 119 Stat. 2214, 2215; Act of Dec. 8, 2004, Pub. L. No. 108-447, Div. D, § 543(a) and (f)(4), 118 Stat. 3011, 3012. The fact that Congress has provided a mechanism for fulfilling judgments in the event they are rendered says nothing about whether Section 1605(a)(4), enacted 30 years earlier, confers jurisdiction over such claims. Moreover, contrary to the court of appeals' understanding, petitioners' construction of the immovable property exception would not "make dead letters" of the more recent laws. Pet. App. 12. Neither refers to the immovable property exception, and each could be given full effect as to a judgment rendered pursuant to Section 1605(a)(1) (waiver of immunity), or in a suit brought *by* a foreign state, *e.g.*, *Republic of Argentina* v. *City of New York* *supra*.

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